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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JURRAY WILLIE CASEY, Defendant and Appellant.	B201371 (Los Angeles County Super. Ct. No. SA058967)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Judgment affirmed as modified.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jurray Willie Casey (appellant) of first degree murder (Pen. Code, § 187, subd. (a))[1] (count 1) and shooting at an occupied vehicle (§ 246) (count 2). As to each count, the jury found the gang allegation to be not true. The jury found with respect to both counts that a principal personally used and discharged a firearm and caused death within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1).

The trial court sentenced appellant to state prison for a term of 50 years to life. The sentence consisted of 25 years to life in count 1 and a consecutive 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1). In count 2, the court imposed the midterm of five years and a consecutive 25 years to life for the firearm enhancement. The sentence in count 2 is to run concurrently to that in count 1.

Appellant appeals on the grounds that: (1) he was denied his rights to compulsory process and due process of law when the prosecutor and the court declined to grant immunity to defense witnesses; (2) the trial court's exclusion of the statements of certain witnesses deprived appellant of his due process and other constitutional rights to present a defense; (3) the trial court committed prejudicial error in improperly instructing the jury on the natural and probable consequences doctrine; (4) the trial court erred in overruling objections to portions of the gang experts' testimony because such testimony was speculative, lacked proper foundation, and intruded upon the jury's determination of the ultimate issues pertinent to guilt; (5) the experts' opinions that everyone in appellant's car knew and intended to commit a violent crime in driving outside their gang's territory usurped the jury's factfinding role, thereby depriving appellant of his rights to due process and a jury trial; (6) the natural and probable consequences doctrine violates the rights to due process and trial by jury by improperly permitting conviction based on ordinary negligence; (7) CALCRIM No. 220's definition of reasonable doubt violated

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

appellant's federal due process right to have his guilt determined beyond a reasonable doubt and requires that the judgment be reversed; (8) CALCRIM No. 226 invites jurors to consider matters outside the record in violation of the defendant's constitutional rights to due process, a fair trial and confrontation; (9) the district attorney engaged in repeated and varied forms of prosecutorial misconduct; (10) improper juror contact abrogated appellant's presumption of innocence and denied him his constitutional right to due process and a fair trial; (11) cumulative error denied appellant his due process right to a fair trial; (12) the trial court erred in failing to stay the sentence in count 2 pursuant to section 654; (13) imposition of separate punishment on the murder and shooting at an occupied vehicle counts violated the double jeopardy clauses of the United States and California Constitutions; and (14) the trial court erred in imposing personal firearm discharge enhancements where the prosecution only pleaded and sought jury findings on principal use and discharge of a firearm, denying appellant due process of law and his Sixth Amendment right to a jury determination on all issues.

FACTS

Prosecution Evidence

On the night of January 7, 2006, Jamarea Wilson (Wilson), Leon Collins (Collins), Tariq Anderson (Anderson), Rammon Lewis (Lewis) and Rashad Ali (Ali) went to the Debbie Allen Dance Studio in Culver City. They were all enthusiasts of crumping, a form of African tribal dancing, and there was a crump dance competition at the studio that night. Crumpers have no interest in street gangs. During the event, there was an altercation and shots were fired. Everyone was told to leave, but Wilson and his friends kept dancing in the parking lot until police told them to leave.

Wilson was driving his customized Dodge Durango that was painted blue and red. Wilson's dance name from crumping was Superman, and he had a Superman symbol painted on the hood of his Durango. The truck had 22-inch rims and red dust covers. On the rear door was painted the phrase "I can't be stopped." Collins, Anderson, and Ali sat in the backseat of the Durango when they left the dance studio. As they drove along, Anderson noticed appellant driving toward them from the opposite direction in a

Thunderbird. Anderson saw appellant giving the Durango a hard stare. He became concerned when he saw appellant make a U-turn and drive behind them until it stopped two lanes over from the Durango while both cars waited at a red light. Anderson told Wilson to take off when the light turned green. Wilson was in the No. 1 lane, another car was in the No. 2 lane, and the Thunderbird was in the "gutter lane."

When the light changed, Wilson accelerated. Appellant also accelerated, passed the car in the middle lane, and pulled in front of it, drawing alongside the Durango. No words or gestures were exchanged between the two cars. Someone in the Thunderbird put his arm out the driver's window and fired several shots. Wilson braked and made an illegal U-turn. He drove in the opposite direction until he saw a police officer. The Thunderbird had kept on moving. When Wilson asked his passengers if everyone was all right, Ali realized he had been shot.

At trial, Collins identified appellant as the driver of the Thunderbird and stated that he saw appellant "stick his arm like halfway out the window with a gun in his hand." His arm was "built" "like a football player." At the field show up, he selected appellant as the driver and shooter. He later told the district attorney that the arm he saw was light-skinned. Anderson also identified appellant at the field showup.

Officer Randy Vickrey of the Culver City Police Department saw the Durango run a red light and stop in front of his patrol car at approximately 12:40 a.m. on January 8, 2006. Wilson said that his friend had been shot, and Officer Vickrey called an ambulance. Ali later died during surgery. He had suffered a gunshot wound to the abdomen.

Officer Andrew Bass heard a radio broadcast that a Thunderbird had been involved in a shooting and made a traffic stop of appellant's car approximately one mile from the shooting scene. The car was also occupied by Donovan Halcom (Halcom), Jabbarri Green (Green), and Lamar Jacobs (Jacobs). Officer Bass handcuffed the men and the car was searched. Officer Bass found a mitten containing six .22-caliber bullets behind the driver's seat. He discovered a nine-millimeter handgun and a .22-caliber handgun hidden in a compartment behind a speaker cover in the backseat.

Detective Tina Jones of the Los Angeles Sheriff's Department worked in the gang suppression division. She testified at appellant's trial that on March 17, 2005, she searched appellant's residence. She found a shoebox under his bed that bore gang graffiti and the words "Ray Ray" and "B.I.G. 4 Life." Detective Jones stated that the graffiti identified appellant as a member of the Baby Insane Crips for life. The box contained clippings about appellant's high school football exploits. Appellant had the word "Ray" tattooed on each arm. Detective Jones was investigating an incident at a Skate Depot involving appellant that occurred in February 2005. Appellant told Detective Jones he was standing outside the Skate Depot with two friends from the Baby Insane Crips when members of the Rolling 20s approached them and yelled an insult. The situation escalated into a fight.

Officer Chris Zamora of the Long Beach Police Department testified as a gang expert. The Long Beach Insane Crips gang had approximately 1,000 members and committed crimes ranging from murder to narcotics sales. The Baby Insane Crips gang was a young clique with a lot to prove, and it committed acts of violence to enhance its reputation. They were rivals of any Blood gang and of the Rolling 20s Crips. Officer Zamora was of the opinion that appellant was a member of the Baby Insane Crips because of his tattoos, his gang friends, and the shoebox found under his bed.

Defense Evidence

Ranard Gaston, appellant's cousin, testified that he was a former member of Baby Insane Crips and that his moniker was Little Bay Lon. After serving a prison sentence for robbery he turned his life around. He stated that the writing on the shoebox was his. He and appellant would make model cars together when they were younger and keep them in the box. Gaston wrote the graffiti on the box and tried to convince appellant to join the gang, but appellant was interested only in sports. Appellant's nickname, Ray Ray, was given to him by his family. Appellant's brother was called Tut Tut.

Collette Burns, appellant's mother, also testified that Ray Ray was appellant's family nickname and that the shoebox was used for storing model cars. She knew nothing about the graffiti. She stated that appellant was not a gang member and that he

associated with Gaston because they were cousins. Appellant was a popular football star at Long Beach Polytechnic High School with a promising future.

The Thunderbird appellant drove on the night of the shooting was owned by his cousin, Jameelah Ginn. She bought the car when her other car needed repairs. She did not buy the car for appellant. Ginn permitted her family members to drive the Thunderbird. As for appellant, she usually drove him wherever he needed to go.

The head coach at Long Beach Polytechnic, Raul Lara, was also a probation officer. Appellant was one of the best players on his team and Lara had no reason to believe appellant was a gang member. Appellant had come to speak to him after the incident at the Skate Depot.

Gordon Golding, a private investigator, examined the Durango and the Thunderbird for the defense. He constructed dowels to use in determining the trajectory of the bullets that hit the Durango. He also conducted an experiment in which a man who was five feet ten inches in height and who weighed 180 pounds sat in the rear seat of the Thunderbird behind the driver's seat. The man was able to put his arm out the window from his rear seat. Golding stated that someone sitting behind appellant could have been the shooter. Golding showed photographs of the dowels and the protruding arm.

Rebuttal Evidence

Officer Emery Eccles of the Culver City Police Department interviewed appellant after the shooting. Appellant told him that he drove his cousin's Thunderbird back and forth to school five days a week.

Appellant's rear passengers, Green and Jacobs, did not testify, but the prosecutor had appellant and the two men show their forearms to the jury.

DISCUSSION

I. Denial of Immunity

A. Appellant's Argument

Appellant contends that the circumstances warranting the granting of judicial immunity to defense witnesses Green and Jacobs were present in this case. The trial court's refusal to grant immunity deprived appellant of the right to compulsory process

and due process of law. Appellant also argues that the prosecutor used his discretion to refuse immunity under circumstances that distorted the factfinding process. Because the denial of immunity for Green and Jacobs prevented the jury from hearing testimony that contradicted the prosecution's theory of the case and from hearing a factual basis for a third-party-culpability defense, the error was prejudicial and reversal is required.

B. Proceedings Below

On April 12, 2007, defense counsel filed a motion requesting the court to extend judicial use immunity to necessary defense witnesses, or in the alternative, to admit the pretrial statements of Green and Jacobs. In the motion, defense counsel stated that Green and Jacobs independently gave statements identifying the right front passenger, Halcom, as the shooter.

At the hearing on the motion, the prosecutor confirmed that he was not extending immunity to either Green or Jacobs, and he objected to the court extending immunity. After hearing defense argument, the trial court stated that no case has recognized the conferring of judicial immunity in California. Even in other jurisdictions where it has been recognized, it is used in very limited circumstances. The court pointed out that the information from the proposed witnesses was not exculpatory—rather, it presented only a conflict in the evidence. The court also believed there was a strong governmental interest in not granting immunity since the individuals might themselves be guilty. The court did not believe the prosecutor was deliberately subverting the factfinding process. The court also denied the second part of the defense motion requesting that Green's and Jacob's prior statements be admitted regardless of their hearsay nature.

C. Relevant Authority

The California Supreme Court has "characterized as 'doubtful' the 'proposition that the trial court [possesses] inherent authority to grant immunity.' [Citations.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 468; see also *People v. Lucas* (1995) 12 Cal.4th 415, 460 (*Lucas*).) The court has also stated that it is "possible to hypothesize cases where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial." (*People v. Hunter*

(1989) 49 Cal.3d 957, 974 (*Hunter*); see also *People v. Samuels* (2005) 36 Cal.4th 96, 127.)

D. Immunity Properly Withheld

1. Court-Ordered Immunity

As stated previously, the California Supreme Court has noted that the great majority of cases reject the notion that a trial court has the power to confer immunity on a witness called by the defense. (*In re Williams* (1994) 7 Cal.4th 572, 610 (*Williams*).) The case of *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964 (*Smith*), cited by appellant, is the case from which the court in *Hunter,* followed by subsequent courts, drew the elements of the analysis used in determining whether judicially conferred immunity is necessary. (*Hunter, supra,* 49 Cal.3d at p. 974.)

As stated in *Hunter*, "[T]he *Smith* court . . . recognized that 'the opportunities for judicial use of this immunity power must be clearly limited; . . . the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity . . . . [¶] [T]he defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.'" (*Hunter, supra*, 49 Cal.3d at p. 974, quoting *Smith, supra*, 615 F.2d at p. 972.)

Assuming, as the courts did in *Lucas*, *Hunter*, and *Williams*, that judicial authority to grant immunity exists, we conclude, as did the trial court, that the circumstances in this case did not meet the stringent requirements described in *Hunter* and *Smith* that would allow for the grant of such immunity. As the court stated in *Hunter,* appellant's offer of proof "fell well short of the standards set forth in the one case which has clearly recognized such a right," *Smith*. (*Hunter, supra,* 49 Cal.3d at p. 974.) First, the testimony proffered in the instant case by defense counsel was not clearly exculpatory. As the trial court observed, appellant was still culpable as an aider and abettor regardless

of whether Green and Jacobs testified that the front passenger was the shooter. The trial court believed that the proffered testimony was exculpatory only on the firearm-use allegation, although this belief is not well founded, since appellant also would share aider and abettor liability for the firearm use.

As for the testimony being essential, the trial court agreed that it would be helpful, but stated it would merely be conflicting testimony on identification rather than the exculpatory testimony it was purported to be. In addition, as the trial court observed, the defense had other means to attack the People's case as it related to the identification of the shooter. The defense did bring in expert testimony to show the bullets' trajectories and to demonstrate that the passenger sitting behind the driver was the shooter, which was the essence of appellant's defense.

Finally, the court stated that there was a strong governmental interest in not granting immunity in a case where the proposed witness may themselves have been involved in the homicide. (See, e.g., *People v. Stewart*, *supra*, 33 Cal.4th at pp. 469-470 [proposed witness's statements suggested he himself might be guilty, which would provide a strong governmental interest in not granting immunity; witness's statements were conflicting and may have been perjurious; cross-examination would be burdensomely limited].) In this case, although Green and Jacobs were not charged at the time of trial, they were nevertheless subject to being aiders and abettors or accessories. Although appellant urges that the prosecutor could have designed his cross-examination so as to preserve his ability to charge the men, there was no way to predict what information might be elicited at trial. There was every possibility of tying the prosecution's hands with respect to any future proceedings. The People would have been forced to prove that any evidence used was not obtained or even derived from the testimony at appellant's trial. (See *People v. Stewart*, *supra*, at p. 471.)

We conclude that the trial court's conclusions are adequately supported by the record. The trial court did not err in denying appellant's motion for court-ordered immunity.

2. Prosecutorial Immunity

"[A]lthough the prosecution has a statutory right, incident to its charging authority, to grant immunity and thereby compel testimony [citation], California cases have uniformly rejected claims that a criminal defendant has the same power to compel testimony by forcing the prosecution to grant immunity." (*Williams, supra*, 7 Cal.4th at p. 609; see also *Lucas, supra*, 12 Cal.4th at p. 459.)

On this issue, the trial court stated, "Moreover, I do not see, finally, just for the record, that this is a situation where the prosecution is deliberately trying to subvert the factfinding process. This isn't a situation where they're granting immunity to one witness and not another when they have equal basis to believe or no basis to believe that one is telling the truth and not the other. And they're relying on the—the testimony of witnesses that were in the victim's car, who are not connected to the defendant, while these witnesses are. And I think under those circumstances, it would be impossible for me to conclude, based on these facts, that they're doing this deliberately to subvert the factfinding process."

The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense. (*Lucas, supra*, 12 Cal.4th at p. 457.) A defendant's constitutional rights to compel the attendance of witnesses, as guaranteed by the Sixth Amendment, and to due process, as guaranteed by the Fourteenth Amendment, are violated when the state interferes with the defendant's right to present witnesses. (Cf. *Lucas, supra,* at p. 455 [alleged prosecutorial misconduct prevented a witness from testifying].) While prosecutorial interference with the defendant's right to present witnesses is misconduct, the prosecutor's interfering conduct must be "'"entirely unnecessary to the proper performance of the prosecutor's duties,"'" and must have served "'"to transform a defense witness willing to testify into one unwilling to testify."'" (*Lucas, supra,* at p. 457.) The defendant also must demonstrate that the prosecutor's interfering conduct was a substantial cause in depriving defendant of the testimony and that the testimony was material to the defense. (*Ibid.*)

We agree with the trial court. The record shows that the prosecutor did not intimidate Green and Jacobs or even discourage them from testifying. The record clearly shows that the two witnesses invoked the Fifth Amendment after conferring with their own court-appointed attorneys. Thus there is no causal link between the prosecutor's acts (which did not constitute misconduct) and appellant's inability to present witnesses on his behalf. Therefore, there was no violation of appellant's right to compulsory process, whether or not the proffered testimony was material. (*In re Martin* (1987) 44 Cal.3d 1, 31-32.)

The prosecutor did nothing to transform a willing defense witness into an unwilling one as occurred in *United States v. Lord* (9th Cir. 1983) 711 F.2d 887, 891 (*Lord*), cited by appellant. In that case the prosecutor allegedly told the defense witness before trial that "whether he would be prosecuted depended on his testimony." (*Id*. at p. 891.) The case was remanded for an evidentiary hearing. (*Ibid*.) Nor did the prosecutor grant immunity to favorable witnesses while denying the same to unfavorable witnesses, as occurred in *U.S. v. Westerdahl* (9th Cir. 1991) 945 F.2d 1083, 1086, also cited by appellant. In that case, the prosecution relied on circumstantial evidence given by two witnesses who were granted immunity by the government and another who testified as part of a plea bargain in which numerous pending charges were dismissed. (*Id.* at p. 1087.) In that case as well, the court held that the prosecution may have disrupted the factfinding process and ordered an evidentiary hearing. (*Ibid*.)

In this case, appellant has had his evidentiary hearing. As stated in *Lord*, "the key issue in the analysis of defense use immunity is whether the defendant was denied a fair trial." (*Lord, supra,* 711 F.2d at p. 892.) Appellant had an evidentiary hearing in which the trial court reached the correct conclusion, and appellant was not denied a fair trial. We reject appellant's arguments.

II. Exclusion of Prior Statements by Green and Jacobs

A. Appellant's Argument

Appellant contends that, in the absence of a grant of immunity, the only way in which the defense could present the relevant and exculpatory evidence regarding the

identity of the shooter was to admit Green's and Jacobs's earlier statements to police. The defense motion argued that courts have the authority to recognize nonstatutory exceptions to the hearsay rule or to create them for classes of evidence for which there is a substantial need. Because this evidence was necessary and exculpatory, the trial court's exclusion deprived appellant of his constitutional right to present a defense.

B. Proceedings Below

As noted previously, defense counsel's motion requesting immunity for Green and Jacobs also requested that, in the alternative, the trial court admit the out-of-court statements the men made to police, even though they would not be subject to cross-examination. The trial court stated that the portions of the Evidence Code that exclude this type of testimony were kept intact by the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)). The court stated that "even assuming that there is such an exception that would allow me to do it, I question the independent reliability of such statements, sufficiently reliable to have them come in. I don't believe an exception exists; and secondly, if it did, I don't think it would apply to these facts."

C. Relevant Authority

"As a general proposition, the ordinary rules of evidence do not infringe on a defendant's right to present a defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 682-683.) Trial courts possess the 'traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' (*People v. Hall* (1986) 41 Cal.3d 826, 834.) The trial court's rulings in this regard will not be overturned on appeal unless it can be shown that the trial court abused its discretion. ([*People v.*] *Cooper*[(1991)] 53 Cal.3d [771,] 816.) Nonetheless, the trial court's discretion is not without limits, particularly if it operates to hamper defense counsel's ability to present evidence. (*Ibid*.)" (*People v. Frye* (1988) 18 Cal.4th 894, 945.)

D. Statements Properly Excluded

Appellant cites *Chambers v. Mississippi* (1973) 410 U.S. 284 for the proposition that defendants have a constitutional right to have the prosecution's case subjected to

meaningful adversarial testing. As explained in *Lucas, supra*, 12 Cal.4th 415, in *Chambers*, "the trial court excluded defense evidence relating to a witness's out-of-court confessions because Mississippi law excluded hearsay without any exception for statements against penal interest. State law also precluded cross-examination of nonadverse witnesses, so defendant was unable to cross-examine the witness regarding his prior confession when the witness denied complicity on the stand. The high court explained that evidence of the out-of-court confessions was critical to the defense but was excluded despite overwhelming indicia of reliability. [Citation.] It declared that the exclusion of this evidence, along with limitations on the defendant's ability to cross-examine the witness, were a denial of due process in that they deprived defendant of the right to present a defense. [Citations.]" (*Lucas, supra*, at p. 464.)

Thus we see that, for evidence to be admissible in contravention of the hearsay rule and its established exceptions, such evidence must bear "persuasive assurances of trustworthiness." (*Lucas, supra*, 12 Cal.4th at p. 464.) The United States Supreme Court has stated, in discussing the federal residual hearsay rule, that "statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability. [Citations.]" (*Idaho v. Wright* (1990) 497 U.S. 805, 820-821.) The court went on to say that the "'particularized guarantees of trustworthiness'" necessary for admission of evidence in contravention of the hearsay rule must be as great. (*Id*. at p. 821.)

In the instant case, the evidence proffered by appellant lacked "persuasive assurances of trustworthiness" (*Lucas, supra*, 12 Cal.4th at p. 464) necessary for its admission, and there is no constitutional right to admit unreliable hearsay (*People v. Ayala* (2000) 23 Cal.4th 225, 269 (*Ayala*)). Indeed, the *Chambers* decision has specifically been held not to apply to a purported eyewitness's hearsay statements to police. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 82-83.) "Not only was the declarant unavailable to explain those statements, but there was no indication that the statements were reliable, as they lacked the conventional indicia of reliability: they were not made under oath or other circumstances that impress the declarant with the solemnity

of the statements; the declarant's word is not subject to cross-examination; and she is not available in order that her demeanor and credibility may be assessed by the jury." (*People v. Kegler*, *supra*, at p. 83.)

In the instant case there was evidence to suggest the statements were unreliable. Both Green and Jacobs were in the backseat of the Thunderbird where the weapons were stashed. They were seen making furtive movements after the car was stopped by police. Appellant's defense was that Jacobs did the shooting, and he put on an expert witness to prove it. Jacobs had a clear motive to name someone else—quite the opposite of a statement against his penal interest. The statements by Jacobs and Green were plainly unreliable hearsay, and their exclusion did not violate the due process clause.

III. Aiding and Abetting/Natural and Probable Consequences Instruction

A. Appellant's Argument

Appellant contends that the trial court erred when it read a modified version[2] of CALCRIM No. 402 on the natural and probable consequences doctrine in which it named two target offenses—one of which was the offense of permitting another to shoot from a vehicle (§ 12034, subd. (b)). Appellant argues that only the *driver* of a vehicle, i.e., appellant himself, could have committed this crime. However, under a natural and probable consequences theory, the target crime must be an offense that a defendant commits while acting as an *accomplice* or an *aider and abettor*. It cannot be a crime that the defendant himself commits. Therefore, a violation of section 12034 could not have been a target offense aided and abetted by appellant. Appellant asserts that this error requires reversal because it resulted in the jury being presented with an erroneous theory of culpability for murder under the natural and probable consequences doctrine, and this court cannot determine from the record on which theory the verdict rested.

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[2] Appellant does not complain about the modifications in the first paragraphs of the instruction. The court adapted the language to the circumstances of this case, where the natural and probable consequences theory was not the only theory of guilt.

B. Relevant Authority

Section 12034, subdivision (b) provides: "Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years."

When the evidence triggers the application of the natural and probable consequences doctrine to an aider and abettor, "the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. omitted; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 8.)

"[W]hen the prosecution relies on the 'natural and probable consequences' doctrine to hold a defendant liable as an aider and abettor, the trial court must, *on its own initiative*, identify and describe for the jury any target offense allegedly aided and abetted . . . ." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 268.) A particular criminal act is a natural and probable consequence of another criminal act if, "under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

"When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is no longer determined

under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276-277.)

C. Proceedings Below

After the prosecutor's closing argument and on the second day of defense argument, the court announced that it was going to instruct on the target offenses of shooting at an occupied vehicle and allowing someone to discharge from a vehicle. The trial court believed that the notion of having guns in one's car, which the prosecutor had indicated was the target offense, was "attenuated" as a target offense. After completing argument, defense counsel stated that he, like the prosecutor, had fashioned his argument around an underlying act of "guys going out with guns, doing the shooting. That's going to be the underlying act." The court explained that the defense argument that appellant was unaware Jacobs was going to shoot would apply to both target crimes the court planned to include. Ultimately both counsel submitted on the court's decision. Before reading the instructions the trial court stated it had reworded the standard instruction because it was applicable only if the People were pursuing the theory of natural and probable consequences as the sole theory of guilt.

After reading the instruction on aiding and abetting, the trial court instructed the jury as it had indicated on the natural and probable consequences theory.[3] The trial court

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3 The defendant is charged in count 2 with shooting at an occupied vehicle and in count 1 with murder. Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. This is because an aider and abettor is not only liable for the intended crime, but also any crimes that are the natural and probable consequence of the target crime. In order to find the defendant guilty of murder under the natural and probable consequences doctrine, you must first decide whether the defendant is guilty of the crimes of shooting at an occupied vehicle or allowing another to discharge a firearm from a vehicle. If you find the defendant is guilty

also read instructions on the two target crimes, CALCRIM No. 965 (shooting at an occupied motor vehicle), and CALCRIM No. 969 (permitting someone to shoot from a vehicle).

D. Any Error Harmless

When a jury is instructed on multiple theories, one of which is factually inadequate, "reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) Jurors need not be told that they have to unanimously agree on which target offense the defendant aided and abetted. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 729.) And, when there is a general verdict in a case involving more than one factual theory, a reviewing court "will presume, unless the record shows otherwise, the jury acted properly and relied on a supported theory. [Citation.]" (*Id*. at pp. 733-734.)

We conclude that CALCRIM No. 402 as read by the trial court logically applied to the facts of this case and did not permit the jury to find appellant guilty on an unlawful

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of either of these crimes, you must then decide whether he is guilty of murder. To prove that the defendant is guilty of murder under this theory, the People must prove that: 1. The defendant is guilty of shooting at an occupied vehicle or allowing another to discharge a firearm from a vehicle; 2. During the commission of the shooting at an occupied vehicle or allowing another person to discharge a firearm from a vehicle, the crime of murder was committed; and 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of the shooting at an occupied vehicle or allowing another to discharge a firearm from a vehicle. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the shooting at an occupied vehicle or allowing another to discharge a firearm from a vehicle, then the commission of murder was not a natural and probable consequence of shooting at an occupied vehicle or allowing another to discharge a firearm from a vehicle.

theory. At worst, including the offense of permitting someone to shoot from one's vehicle was redundant and, as a result, superfluous.

It is true that, since only the driver or owner of the vehicle can commit this crime, appellant had to be a direct perpetrator of this crime. Appellant does not dispute, however, that he could be guilty of murder by aiding and abetting the shooting at an occupied motor vehicle with the natural and probable consequence of murder. Clearly, the offense of permitting someone to shoot from his Thunderbird (at the occupied Durango) precisely describes the act of aiding and abetting the target offense of shooting at an occupied vehicle. Therefore, there was no erroneous factual theory on which the jury could have founded its verdict. The instruction cannot be said to suffer from legal or factual inadequacy as discussed in *Guiton*, *supra*, 4 Cal.4th at page 1121.

That no erroneous theory was presented is bolstered by an examination of the prosecutor's closing argument. The prosecutor argued that appellant was the shooter, "But you know what? The law once again says, even if he's not the shooter, he's an aider and abettor. He drove the car. He positioned the car." The prosecutor subsequently went through each element of the aiding and abetting instruction followed by an explanation of the natural and probable consequences doctrine.

The insertion of the crime described by section 12034 may have suffered from a deficiency in logic, but it did not present to the jury an erroneous theory. There were only two theories presented; that appellant was the direct perpetrator (the shooter) or that he was an aider and abettor. Any error or inartful language in the instruction was not likely to have misled the jury into misconstruing or misapplying the law of aiding and abetting under the natural and probable consequences doctrine in light of the entirety of the instructions, the evidence and the arguments of counsel. (*People v. Dieguez*, *supra*, 89 Cal.App.4th at p. 276.) The jurors could not have convicted appellant without finding that he, at a minimum, aided and abetted the shooting at an occupied vehicle under the facts of this case. There was no miscarriage of justice, since there was no reasonable possibility of a result more favorable to appellant had only the target offense of shooting at an occupied vehicle been included. (*Id.* at pp. 277-278.)

IV. Gang Expert's Testimony

A. Appellant's Argument

Appellant contends that, in answering the prosecutor's hypothetical questions, the gang experts in this case testified about the knowledge, purpose, motive, and intent of the occupants of appellant's car prior to the shooting. Officers Zamora and Jones effectively testified that each of the occupants of the Thunderbird knew of the presence of the weapons and went driving outside the gang territory with the intent of engaging in violent criminal conduct. Such improper testimony was disapproved of in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). The two experts went beyond the proper scope of gang expert testimony, i.e., the culture and habits of criminal street gangs.

Appellant argues that, even though the jury found untrue the gang allegation, the improper opinions were prejudicial because they affected the jury's consideration of appellant's role as an aider and abettor. Appellant asserts that the jury apparently relied on the aiding and abetting theory in convicting appellant. It is reasonably probable that it would have reached a different conclusion regarding appellant's aider and abettor liability had the court excluded the impermissible portions of the gang experts' opinions.

B. Relevant Authority

A trial court has discretion concerning the admission of evidence, including expert testimony. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) An expert may offer opinion testimony if the subject is sufficiently beyond common experience so that it would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *Killebrew*, *supra*, 103 Cal.App.4th at p. 651.)

In order to assist the trier of fact, the culture and habits of criminal street gangs are proper subjects for an expert's opinion. (*Gardeley*, *supra*, 14 Cal.4th at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) An expert may base his or her testimony on reliable material not admitted into evidence or even inadmissible material as long as it is of a type reasonably relied upon by experts in that particular field. (*Gardeley*, *supra*, at p. 618.) A properly qualified gang expert may, where appropriate, testify to a wide

variety of matters, including but not limited to, whether and how a crime was committed to benefit or promote a gang; the motivation for a particular crime; a gang's culture, habits, and territory; and rivalries between gangs. (*Killebrew*, *supra*, 103 Cal.App.4th at pp. 656-657, and authorities cited therein.) Such testimony may address the ultimate issue in the case (Evid. Code, § 805; *Killebrew*, *supra*, at p. 651) and may be based on hypothetical questions derived from the facts of the case (*Gardeley*, *supra*, at p. 618).

C. Proceedings Below

Officer Zamora was the first witness and gave his gang expert testimony before the facts of the case were presented to the jury. The testimony to which appellant objects was in response to the prosecutor's hypothetical questions. The prosecutor asked Officer Zamora to assume that a member of the Long Beach Insane Crips gang goes outside of his Long Beach territory to Culver City in a car with three other people in it and with a Ruger nine-millimeter, a .22-caliber revolver, numerous .22-caliber bullets, nine-millimeter ammunition, gloves, and mittens. The prosecutor asked the officer to give his opinion, based on his training and experience, as to the purpose of "rolling out of your territory deep with four people in the car?" Defense counsel objected, and the trial court overruled the objection subject to a motion to strike should there not be any evidence to establish the facts in the hypothetical upon which the opinion was based.

Officer Zamora responded by stating that, in the gang culture, this was known as rolling deep. He would think the four people were going to commit a violent crime together for profit or to enhance their reputation. Defense counsel objected and moved to strike. At the bench, he stated that the officer was not competent to testify about the mental state of all the persons in the car. The trial court stated that the expert could give his opinion based on hypothetical facts as to whether the crime was committed at the direction of, or for the benefit of a street gang. When defense counsel repeated that Officer Zamora could not testify as to what people knew in the car, the trial court stated that Officer Zamora had not done so, and the prosecutor agreed.

The prosecutor also posed a hypothetical to Detective Jones about the concept of rolling deep. The prosecutor asked, "So in your opinion, if members of Long Beach

Insane go outside of their territory to Culver City in the car with multiple rounds of ammunition and multiple handguns, rolling deep, what is the purpose of that?" Defense counsel objected, stating there was no foundation. The trial court allowed a response subject to a later motion to strike if the facts upon which Jones based her opinion were not produced. Defense counsel then stated that the nature of his objections was that Jones was testifying to somebody else's statement, and his objection was overruled. Jones responded to the hypothetical by stating, "Okay. They're leaving their area, first of all. They're not gonna leave their area without a plan. If something happened, they have to be ready to act. They roll deep. They know that if something happened, they're stopped by the police, or if they're caught with the weapons in the car, they're gonna bail, they're gonna run. . . . So when they roll deep, the plans are all ready. And they have the weapons in the car. They're going to take action. Something is bound to happen, and most of the time it does."

D. Testimony Properly Admitted

Although isolated segments of the testimony that appellant finds objectionable appear similar to the disapproved testimony in *Killebrew*, we conclude that the testimony of Officer Zamora and Detective Jones was within the permissible area of gang expectations, a facet of gang culture. The objectionable testimony in *Killebrew* consisted of the expert's opinion that "each of the individuals" in three different cars knew there was a gun in two of the cars and each individual "jointly possessed the gun with every other person in all three cars for their mutual protection." (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658.) The expert also testified "that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id*. at p. 652.) *Killebrew* noted there was nothing in the evidence to support this opinion. Further, this testimony improperly addressed the subjective knowledge and intent of each individual in each vehicle. (*Id*. at p. 658.) Because the expert's testimony was based on nothing more than the expert's opinion as to how the case should be decided and was the only evidence offered to establish the

knowledge element of the charged offense of conspiracy, reversal was required. (*Id*. at pp. 658-659.)

In this case, neither officer gave an opinion as to how the case should be decided, and their expert testimony was far from the only evidence offered to establish the elements of the crime. Officer Zamora responded to the prosecutor's request to explain "rolling deep," which is an aspect of gang culture. When Officer Zamora said that "everybody is going to know about it," he was clearly referring to the fact that the community would know about the crime, thus referring to the status-enhancing motive for the crime. Neither Officer Zamora nor Detective Jones strayed from speaking in the general terms elicited by the hypothetical questions. As in *Olguin*, *supra*, 31 Cal.App.4th at page 1371, Officer Zamora's and Detective Jones's testimony related to "what gangs and gang members typically expect and not on [appellant's] subjective expectation." Clearly, *Killebrew* does not preclude the prosecution from eliciting expert testimony that provides the jury with information from which it may infer the motive for a crime or the perpetrator's intent.

As the California Supreme Court stated in *People v. Gonzalez* (2006) 38 Cal.4th 932, 946 (*Gonzalez*) "we read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" Such did not occur in the instant case. Further, as in *Gonzalez*, although it is true that the officers' opinions, if found credible, might, together with other evidence, lead the jury to find appellant committed the offense, this renders the evidence probative rather than inadmissible. (*Id*. at p. 947.) In this case, appellant and his cohorts apparently did not know Ali and the other occupants of the car, and the gang experts' testimony was highly relevant and probative on the issue of motive. "'The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible.'" (*Ibid.*)

In any event, these remarks were harmless in the instant case. Notably, the jury found "not true" the allegation that appellant committed the crimes for the benefit of a criminal street gang. And although appellant urges that the objected-to testimony

adversely affected the jury's view of appellant as an aider and abettor, we disagree. In *Killebrew*, because the expert's testimony was the only evidence the People offered on the elements of the crime the opinion "did nothing more than inform the jury how [the expert] believed the case should be decided" and was an improper opinion on the ultimate issue. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658.) Here, there was ample evidence to convict appellant as either the shooter or an aider and abettor. The weapons were found in a hidden compartment built into the speakers of *appellant's* car. It is reasonable to infer that only appellant, of the four occupants of the Thunderbird, would have authorized and created this hiding place. Appellant was the driver who crossed paths with the Durango, stared at the car, and then made a U-turn to follow it. Appellant passed the car traveling between him and the Durango and drove up alongside the Durango. Appellant was identified as the shooter by one of the Durango's occupants. Even if the shooter were Jacobs, as appellant argued at trial, the jury very reasonably could infer that appellant facilitated the shooting that resulted in the murder. Appellant's argument is without merit.

V. Gang Experts' Testimony and Due Process

A. Appellant's Argument

Appellant argues that the testimony described in the previous section also had the effect of compelling guilty verdicts, which resulted in the usurpation of the jury's role as the finder of fact. According to appellant, although the trial judge did not seek to direct the jury's verdict, the testimony of the expert witnesses effectively did so. The testimony therefore constituted a violation of appellant's right to a trial by jury as guaranteed by the Sixth Amendment to the United States Constitution and article 1, sections 3 and 16 of the California Constitution, and is reversible per se.

B. Relevant Authority

"Evidence Code section 805 provides that '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' Nevertheless, an expert opinion is inadmissible 'if it invades the province of the jury to decide a case.' (*Piscitelli v. Friedenberg* (2001) 87

Cal.App.4th 953, 972.) Such evidence is 'wholly without value' to the trier of fact. (*Ibid*.) The determination whether an expert witness's opinion bears upon or decides an ultimate issue in the case is sometimes a difficult decision, and '"a large element of judicial discretion [is] involved."' (*People v. Wilson* (1944) 25 Cal.2d 341, 349.)" (*People v. Frederick* (2006) 142 Cal.App.4th 400, 412; see also *People v. Valdez, supra*, 58 Cal.App.4th at p. 506.)

C. No Sixth Amendment Violation

We find no merit to appellant's claim that the trial court's admission of the gang expert testimony amounted to a directed verdict. A gang expert's testimony may properly be admitted to prove motive and intent. (See *People v. Carter*, *supra*, 30 Cal.4th at p. 1196; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) Expert testimony has frequently been employed to prove the "motivation for a particular crime, generally retaliation or intimidation" and "whether and how a crime was committed to benefit or promote a gang." (*Killebrew*, *supra*, 103 Cal.App.4th p. 657.) Courts have generally found the admission of similar examples of expert testimony proper. (See, e.g., *Gardeley*, *supra*, 14 Cal.4th at p. 619 [gang expert could properly testify that hypothetical attack based on the facts of the case was a classic example of gang-related activity, since gangs use such assaults to intimidate residents]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1209 [expert testimony that defendant committed shooting to enhance his reputation within the gang, reestablish the gang within the community, and send a message to the community and rival gangs was properly admitted]; *People v. Valdez, supra*, 58 Cal.App.4th at pp. 508-509 [trial court properly allowed expert testimony that a caravan of members from seven gangs acted on the date of the charged offense for the benefit of all seven gangs].)

We have concluded that the gang expert testimony was admissible under state law, relevant to the issues in this case, and was not unduly prejudicial. Having reached this conclusion, appellant's Sixth Amendment claim must fail. (See, e.g., *People v. Carter, supra*, 30 Cal.4th at p. 1196 [defendant's claim of federal constitutional error is entirely dependent on claim of state law error and must also fail]; *Ayala, supra*, 23 Cal.4th at

p. 253 [“There was no violation of state law, and because defendant’s constitutional claims are predicated on his assertion that state law was violated, they too must fail”].)

VI. Natural and Probable Consequences Doctrine as a Violation of Constitutional Rights

A. Appellant’s Argument

Appellant contends that the natural and probable consequences doctrine permits liability to be based on negligence even though the charged crime requires a different mental state. An aider and abettor need not share the perpetrator’s mental state or even intend that the crime be committed as long as the perpetrator’s commission of the crime was reasonably foreseeable. The application of the doctrine therefore implicates both state and federal due process considerations. Appellant asserts that the jury was allowed to impose criminal liability for premeditated murder without finding the essential element of malice aforethought.

B. No Due Process Violation

Although the natural and probable consequences doctrine has been subject to criticism (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 248), “[t]he Supreme Court has repeatedly rejected the contention that an instruction on the natural and probable consequences doctrine is erroneous because it permits an aider and abettor to be found guilty of murder without malice. (*People v. Garrison* (1989) 47 Cal.3d 746, 777-778 []; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1231-1232 [].)” (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322.) The doctrine is an “‘established rule’” of American jurisprudence. (*People v. Prettyman*, *supra*, at p. 260.) Appellant’s contention must therefore be rejected.

VII. CALCRIM No. 220 on Reasonable Doubt

A. Appellant's Argument

Appellant contends that CALCRIM No. 220[4] on reasonable doubt, when read together with CALCRIM No. 222, which defines evidence as "'the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence'" limited the jury's determination of reasonable doubt to the evidence received at trial. The jury was precluded from considering the lack of evidence corroborating the weak eyewitness testimony. Appellant also argues that CALCRIM No. 220, by requiring the jury to impartially compare the evidence, reduces the prosecution's burden of proof and violates due process by advising the jury to weigh the evidence in a manner suggestive of the preponderance of the evidence standard. Finally, appellant claims that the giving of CALCRIM No. 220 is reversible per se.

B. No Error

In determining whether jury instructions are correct, we look at the instructions as a whole. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237 (*Campos*).) An instruction is misleading only if in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*Ibid.*) As in the instant case, the defendant in *Campos* did not object to CALCRIM No. 220 at trial and forfeited his claim. (*Campos*, *supra*, at p. 1236.) In any event, his claim is without merit.

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[4] CALCRIM No. 220 provides in pertinent part: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (Italics added.)

With respect to the allegedly misleading nature of CALCRIM No. 220, in *Campos* this court rejected the defendant's argument that the instruction precluded the jury's consideration of lack of evidence. We held that CALCRIM No. 220 does not inform the jury that reasonable doubt must arise from the evidence. Rather, the jury was likely to understand that the determination of the defendant's guilt beyond a reasonable doubt must be based on a review of the evidence presented. (*Campos*, *supra*, 156 Cal.App.4th at p. 1238.) Likewise, in *People v. Flores* (2007) 153 Cal.App.4th 1088, 1093, the court reached the conclusion that "[t]he only reasonable understanding of this language is that a lack of evidence could lead to reasonable doubt." Moreover, appellant's jury was instructed pursuant to CALCRIM No. 355 that a defendant has a constitutional right not to testify and "may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt."

We also disagree with appellant's argument that CALCRIM No. 220 directed the jurors to weigh the evidence under a preponderance of the evidence standard by informing them that "[i]n deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence." The identical argument was rejected in *People v. Stone* (2008) 160 Cal.App.4th 323, 332, where the court held that instructing the jury to compare and consider all the evidence was not tantamount to telling the jury to weigh the evidence by comparing the evidence presented by one side against the evidence presented by the other side. The court stated, "Indeed, such an interpretation is completely inconsistent with the instructions as a whole." (*Ibid*.) In the instant case, the jury here was clearly instructed that the People's burden of proof was "beyond a reasonable doubt." We conclude that the instructions, taken as a whole, were not likely to mislead the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 963.)

VIII. CALCRIM No. 226 and Matters Outside the Record

A. Appellant's Argument

According to appellant, CALCRIM No. 226[5] is troubling because it directs the jurors to use their common sense and experience in judging the credibility of witnesses. This language likely encourages jurors to consider matters not in evidence. Appellant contends there is a real danger that jurors will rely on extra-judicial evidence and/or employ a standard less than proof beyond a reasonable doubt because common sense can be used as a substitute for objective evidence of guilt.

B. No Error

As with appellant's previous issue, *Campos* has disposed of this argument. In that case, we held that "CALCRIM No. 226 does not tell jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience." (*Campos*, *supra*, 156 Cal.App.4th at p. 1240.) *Campos* also distinguished *People v. Bickerstaff* (1920) 46 Cal.App. 764 and *People v. Paulsell* (1896) 115 Cal. 6, relied upon by appellant, on the basis that the instructions at issue in those cases instructed jurors to use their common sense and experience in finding reasonable doubt, which could potentially conflict with the standard of beyond a reasonable doubt. (*Campos*, *supra*, at p. 1240.)

Moreover, as occurred in *Campos*, other instructions informed the jury that using common sense and experience did not encompass considering matters outside the evidence. (*Campos*, *supra*, 156 Cal.App.4th at p. 1240.) The jurors were instructed that

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5 CALCRIM No. 226 provides: "You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe."

the jury must not conduct any research or investigation of the crime (CALCRIM No. 201); that the jury could only consider evidence presented in the courtroom (CALCRIM No. 220); that the jury must decide whether a fact in issue has been proved based on all the evidence (CALCRIM No. 223); and that the jury must carefully review all the evidence before concluding that the testimony of one witness proves a fact (CALCRIM No. 301). Appellant's argument is without merit.

IX. Alleged Prosecutorial Misconduct

A. Appellant's Argument

Appellant contends that the prosecutor denigrated defense counsel in rebuttal argument by suggesting improper motives in the defense argument. He argues that the prosecutor committed *Griffin*[6] error in closing argument by emphasizing the lack of explanation as to why the shooting happened and why appellant made a U-turn. According to appellant, the instances of misconduct were so extensive and extreme as to deprive appellant of a fair trial.

B. Relevant Authority

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.

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6 *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

[Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Even assuming prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (See *People v. Arias* (1996) 13 Cal.4th 92, 161.) Defendant must show it is reasonably probable he would have obtained a result more favorable in the absence of the misconduct. (*Ibid*.) Prosecutorial remarks are misconduct only if there is a reasonable likelihood the jury will improperly misconstrue or misapply the remarks. (*People v. Sanders* (1995) 11 Cal.4th 475, 526.)

C. Analysis

1. Alleged Denigration of Defense Counsel

We disagree that the prosecutor denigrated defense counsel by his remarks. The prosecutor stated during rebuttal argument, "The defense has on numerous occasions misrepresented the evidence, distorted the truth, in an effort to try to confuse you jurors. They try to confuse you because they can't convince you. But justice is not about confusion, it's about the truth." And later, "What about the light skin? We demonstrated for you. Mr. Casey's arm was by far lighter than the other individuals, and by far more muscular than the other individuals. But they just slowly mask over that. Slightly important fact, and they move on with more misrepresentation about the evidence." According to appellant this was an unfair attack on proper defense tactics and there was no indication that counsel had engaged in a pattern of misrepresentation.

"It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense" or to otherwise denigrate defense counsel. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Nevertheless, an improper comment occurs only when there is "a personal attack" on defense counsel. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1166-1167.) Furthermore, "'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 567; see also *People v. Welch* (1999) 20 Cal.4th 701, 752.)

In this case, appellant's contention that the prosecutor denigrated defense counsel by a personal attack is without merit. The prosecutor did no more than tell the jurors not to be fooled by defense tactics, which has consistently found to be appropriate argument. (See, e.g., *People v. Taylor, supra,* 26 Cal.4th at pp. 1166-1167 [it is not improper for a prosecutor to argue that defense counsel used "'tricks'" to confuse a witness]; *People v. Bemore, supra,* 22 Cal.4th at pp. 844-847 [prosecutor's mocking comments on the defense's changing theories were not misconduct]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [comments that experienced defense attorneys "twist a little, poke a little, try to draw some speculation, try to get you to buy something" not misconduct]; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 190-191 [permissible for a prosecutor to tell jurors that defense counsel is "'trying to get you confused'" and "'trying to sidetrack you'"].) Likewise, in the instant case, there was no prosecutorial misconduct.

2. Alleged Griffin Error

Appellant contends the prosecutor specifically called attention to appellant's failure to testify by making the following comment during rebuttal: "Another thing they don't answer, again because it only shows their client's guilt, why did the shooting even happen? What was the explanation for the shooting other than a gang shooting? Why else? Why else would Mr. Casey make that U-turn and pull up next to the Durango and shoot multiple rounds in a car with live human beings?" Also, "And they don't tell you or explain why Mr. Casey even made the U-turn. Why? Why did he make the U-turn? Obviously his whole purpose was to head somewhere west, because that's where they ended up arresting him. So why did he make the U-turn and head east? The only purpose was to shoot at this car."

These remarks do not constitute improper comment on appellant's failure to testify. As the California Supreme Court stated in *People v. Bradford* (1997) 15 Cal.4th 1229, 1339: "In *Griffin v. California* (1965) 380 U.S. 609, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. Its holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to

introduce material evidence or to call anticipated witnesses. [Citations.] Nonetheless, . . . a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided only by the defendant, who therefore would be required to take the witness stand. [Citations.]" (Italics omitted.)

The prosecutor's comments did not amount to arguing that any evidence was uncontradicted. Rather, the prosecutor merely pointed out the failure of the defense to explain a telling circumstance of the crime. In *People v. Medina*, *supra*, 11 Cal.4th at page 758, for example, it was found to be fair comment on the evidence that the prosecutor "suggested that an incriminating inference could be drawn from the defense's failure to call a rebuttal witness" and that the prosecutor "stressed that defense counsel's argument 'conveniently' failed to contest certain elements of the crime." The prohibition in *Griffin* "does not . . . 'extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.'" (*People v. Turner* (2004) 34 Cal.4th 406, 419.) Here, the prosecutor did not suggest that appellant could have presented his own account of the underlying events, and there is no reasonable likelihood the jury would have interpreted the remarks as referring to appellant's decision not to testify. The prosecutor pointed out only that defense counsel, in marshalling the facts during his argument, offered no explanation of the U-turn.

Moreover, "'[indirect], brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.'" (*People v. Turner*, *supra*, 34 Cal.4th at pp. 419-420.) Therefore, even if we were to interpret the prosecutor's remarks as indirectly referring to appellant's failure to testify, we would find the error harmless beyond a reasonable doubt, since the prosecutor did not insinuate that the jury should draw an inference of guilt from this failure. Finally, the trial court told the jurors that appellant could rely on the state of the evidence in deciding whether to testify, and that his silence could not be used against him. (CALCRIM No. 355.)

With respect to both types of alleged misconduct, we note that the jury's verdict demonstrates that it carefully reviewed the evidence, since it did not accept the prosecution's case in its entirety and found not true the gang allegation. Also, the jury was instructed that nothing said by the attorneys during closing argument was evidence, and that the jury must decide the case on the evidence received. (CALCRIM No. 222.) The prejudicial effect of mild misconduct during argument may be dissipated by an instruction that the statements of the attorneys are not evidence. (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396.)

Therefore, not only were there no """"deceptive or reprehensible""""" methods of persuasion at work and no conduct so egregious as to render the trial fundamentally unfair (*People v. Hill* (1998) 17 Cal.4th 800, 819), any comments by the prosecutor during argument were harmless, and defendant suffered no prejudice under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

X. Denial of Mistrial Motion Based on Juror Misconduct

A. Appellant's Argument

Appellant contends the trial court erred in denying his mistrial motion because the evidence in the record is insufficient to rebut the presumption of prejudice due to juror misconduct. Juror No. 4 indicated that she was affected by overhearing a remark by the victim's relative, and the trial court failed to determine whether any other jurors heard the remark or were affected by it.

B. Proceedings Below

After the jury reached a verdict, and while awaiting the arrival of counsel, the trial court stated that it had received information that one of the jurors had been "contacted by" a member of the victim's family near the beginning of the trial.

In a conference with the trial court and the attorneys, Juror No. 4 explained that she was not approached, but as the jurors exited the courtroom, they walked by a relative of the victim. Juror No. 4 heard him say aloud, "I want justice for my boy." This occurred "way before" deliberations. No other juror had indicated to Juror No. 4 that he

or she heard this remark, nor did Juror No. 4 mention the remark to any other juror. The jurors did not learn of Juror No. 4's experience until after the verdict had been reached, when Juror No. 4 spoke with the bailiff. At that time, no one commented that he or she had heard the remark.

When the trial court asked Juror No. 4 if the remark had affected her in any way, she replied, "It affected me because, you know, I am a mother, so—but I went by the evidence and I threw that out. I went by the evidence only." When defense counsel asked Juror No. 4 "What effect did that have on you when it came time to decide those things that you were called upon to decide in the jury room?" Juror No. 4 replied, "It didn't." When counsel asked again if the remark had any effect at all on her ability to decide the case, Juror No. 4 said, "No, it didn't." At that time defense counsel said he was making a motion for a mistrial. The trial court stated, "At this point, I don't believe there's grounds. She seemed to be sincere in saying it didn't affect her."

Before accepting the verdict, the trial court asked all the jurors if they had heard Juror No. 4's conversation with the bailiff. He then asked if anyone else on the panel heard the comment that Juror No. 4 had heard, and several jurors responded, "No." The trial court also confirmed that none of the jurors heard Juror No. 4 say anything about what she had heard. The court then received the verdicts.

C. Relevant Authority

An appellate court applies the abuse of discretion standard of review to any ruling on a motion for a mistrial. (*People v. Williams* (1997) 16 Cal.4th 153, 210.) Such a motion should be granted only when a defendant's chances of receiving a fair trial have been irreparably damaged. (*Ayala*, *supra*, 23 Cal.4th at p. 282.) "'"'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'"' [Citation.]" (*People v. Staten* (2000) 24 Cal.4th 434, 466.)

In determining whether juror misconduct occurred we accept the trial court's credibility findings if supported by substantial evidence. (*People v. Mendoza* (2000) 24 Cal.4th 130, 195.) "Juror misconduct raises a rebuttable presumption of prejudice. The

presumption may be rebutted by proof that prejudice did not actually result." (*Ibid*.) Prejudice may also be rebutted '"by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. . . ."' (*People v. Miranda* (1987) 44 Cal.3d 57, 117, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933.)

D. Mistrial Motion Properly Denied

The California Supreme Court discussed the issue of potential juror bias arising from the juror's receipt of information from outside sources in the case of *In re Carpenter* (1995) 9 Cal.4th 634 (*Carpenter*). *Carpenter* summarized recent California Supreme Court and United States Supreme Court decisions by stating that "when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant." (*Id.* at p. 653; accord, *People v. Tafoya* (2007) 42 Cal.4th 147, 192.) The entire record must be reviewed to determine whether bias was likely, and this includes "the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Carpenter*, *supra*, at p. 654.)

Having reviewed the entire record in this case, we find no likelihood that Juror No. 4 or any juror was biased against appellant. The brief remark was not inherently likely to have biased Juror No. 4. The victim's family members were present during trial, and the likelihood that their feelings were of the sort expressed by the relative who spoke was probably assumed by the jurors and everyone present at trial. The trial court adequately addressed the situation when it questioned Juror No. 4 about the remark's

effect upon her and then questioned all the jurors to determine if they had heard the remark or heard about it from Juror No. 4. The trial court believed Juror No. 4 to be sincere when she stated that the remark had no effect upon her verdict, and the trial court is in the best position to assess a juror's state of mind. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) Therefore, it was unlikely Juror No. 4 was actually biased against appellant, and there was no "irreparable damage" to appellant's chance of receiving a fair trial. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 282.)

XI. Cumulative Error

Appellant claims that the cumulative effect of the errors he has set out was not harmless beyond a reasonable doubt and mandates reversal. Since we have "'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,'" we reject appellant's argument with respect to the cumulative effect of any errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.) As the California Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, appellant received a fair trial.

XII. Count 2 and Section 654

A. Appellant's Argument

Appellant contends that the court erred in imposing a concurrent five-year term on the shooting from an occupied vehicle count (count 2). The sentence should have been stayed pursuant to section 654 on the grounds that appellant bore only a single intent in aiding and abetting the discharge of the firearm from his vehicle.

B. Relevant Authority

Section 654 provides in relevant part: "(a) An[y] act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment[,] but in no case shall the act or omission be punished under more than one provision."

The protections of section 654 extend to situations in which several offenses are committed during an indivisible course of conduct. (*People v. Butler* (1996) 43

Cal.App.4th 1224, 1248.) Indivisibility is determined by the defendant's intent and objective. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the offenses are incidental to, or the means of accomplishing or facilitating a single objective, the defendant may be punished for any one offense but not more than one. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

There is a multiple-victim exception to section 654. (*People v. King* (1993) 5 Cal.4th 59, 78.) "'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not ". . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual." [Citations.]' (*Neal v. State of California* (1960) 55 Cal.2d 11, 20-21.)" (*People v. Oates* (2004) 32 Cal.4th 1048, 1063.)

C. Sentence Properly Imposed

Appellant's acts, whether as a direct perpetrator or as an aider and abettor, clearly fall within the multiple victim exception to section 654. Ali was the victim of the murder, and the other four occupants of the Durango were the victims of the crime of shooting at an occupied motor vehicle. In *People v. Garcia* (1995) 32 Cal.App.4th 1756, for example, the defendant approached a car stopped at a stop sign and ordered the occupants, four men, to get out. (*Id*. at p. 1762.) After robbing three of the men and attempting to rob the fourth, he told the victims to get back in the car. (*Id.* at p. 1763.) As the car pulled away, he fired three or four shots and hit the car. (*Ibid.*) Along with firearm enhancements, the defendant was convicted and sentenced for robbery of three of

the victims, attempted robbery of the fourth, shooting at an occupied motor vehicle, and assault with a firearm on all four victims. The trial court stayed the defendant's sentences for all but one of the assaults—the assault on the driver, Verdin. (*Id*. at pp. 1764-1765.)

On appeal the defendant argued that imposing unstayed sentences on the crime of shooting at an occupied motor vehicle and the assault on Verdin violated the prohibition against multiple punishment under section 654. (*Garcia*, *supra*, 32 Cal.App.4th at p. 1780.) The *Garcia* court explained the multiple victim exception to section 654 under which a defendant may be punished for each crime of violence against a different victim even though he entertains a single objective during an indivisible course of conduct. (*Garcia*, *supra*, at p. 1781.) The *Garcia* court clarified that this did not mean there must be a "'leftover victim,'" that is, at least one victim of the shooting who was not a victim of a charged assault. (*Id.* at pp. 1783-1784.) Rather, the multiple-victim exception applies when each crime in question involves at least one different victim. *Garcia* held that the defendant was properly punished both for the crime of shooting at an occupied motor vehicle, the victims of which were Verdin and three others and for the assault on Verdin, because each crime involved at least one different victim. Therefore, there was no violation of section 654. (*Garcia*, *supra*, at p. 1785.)

Accordingly, under the multiple victim exception to section 654, appellant was properly sentenced for the murder of Ali and for the crime of shooting at an occupied motor vehicle, the victims of which were Ali and the other four passengers.

XIII. Double Jeopardy and Separate Punishment on Counts 1 and 2

A. Appellant's Argument

Appellant asserts that multiple punishment for murder and shooting at an occupied vehicle in this case violates the federal and state double jeopardy clauses, since both acts are the result of appellant's participation in the single act of allowing another to discharge a firearm from his vehicle.

B. Relevant Authority

"The Double Jeopardy Clause . . . affords a defendant three basic protections: [¶] '"[It] protects against a second prosecution for the same offense after acquittal. It

protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' [Citations.]" (*Ohio v. Johnson* (1984) 467 U.S. 493, 498.)

C. No Double Jeopardy Violation

Clearly appellant cannot avail himself of the first two protections the clause provides because he was not subjected to a second prosecution after acquittal or conviction. With respect to the prohibition against multiple punishments, appellant was not punished twice for a single act. He was punished once for each separate act: (1) first degree murder by shooting, and (2) shooting at an occupied motor vehicle. Hence, the double jeopardy clause is not applicable.

Although the federal double jeopardy clause prohibits the government from imposing multiple punishments for the same offense (*Brown v. Ohio* (1977) 432 U.S. 161, 165), this component of double jeopardy "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the [L]egislature. Because the substantive power to prescribe crimes and determine punishments is vested with the [L]egislature, *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 93 (1820), the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent, see *Missouri v. Hunter*, 459 U.S. 359, 366-368 (1983)." (*Ohio v. Johnson, supra*, 467 U.S. at p. 499, fn. omitted.)

For purposes of federal double jeopardy analysis, "the test established in *Blockburger v. United States*, 284 U.S. 299, 304 [] (1932), ordinarily determines whether the crimes are indeed separate and whether cumulative punishments may be imposed. [Citations.]" (*Ohio v. Johnson, supra*, 467 U.S. at p. 499, fn. 8.) "[T]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (*Blockburger v. United States* (1932) 284 U.S. 299, 304.) If the statutes proscribe different conduct, double jeopardy is not violated. However, even if the crimes are the same under the test of *Blockburger v. United States*, double jeopardy is still not violated

if the Legislature has made clear that its intent was to authorize multiple punishment. (*Ohio v. Johnson*, *supra*, at p. 499, fn. 8; *Missouri v. Hunter* (1983) 459 U.S. 359, 366-369.)

In this case, the first degree murder and the crime of shooting at an occupied vehicle each require proof of a fact which the other does not. According to CALCRIM No. 520, in order to find appellant guilty of murder with malice aforethought, the jury had to find (1) that he committed an act that caused the death of another person and (2) when he acted, he had a state of mind called malice aforethought. CALCRIM No. 521 told the jury that appellant was guilty of first degree murder on either of two theories: the murder was willful, deliberate, and premeditated; or the murder was committed by shooting a firearm from a vehicle. "Willfully," "deliberately," and "premeditation" were all defined. To prove the second theory, the People had to prove that (1) [appellant] shot a firearm from a vehicle, (2) he intentionally shot at a person who was outside the vehicle, and (3) he intended to kill that person. The jury was told it need not agree on the same theory.

In order to prove the crime of shooting at an occupied motor vehicle, the People had to prove that (1) appellant willfully and maliciously shot a firearm; and appellant shot the firearm at an occupied motor vehicle. Clearly, the crimes described in counts 1 and 2 in this case each requires proof of a fact that the other does not require. There is no violation of federal double jeopardy.

We also conclude there was no violation of the California double jeopardy clause, where the same analysis apples. "[G]reater and lesser included offenses constitute the 'same offense' for purposes of double jeopardy." (*People v. Bright* (1996) 12 Cal.4th 652, 660, overruled in part on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) "'"The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. [Citations.]"'" (*People v. Pendleton* (1979) 25 Cal.3d 371, 382.) Shooting at an occupied motor vehicle is not a necessarily included offense of

murder. Therefore, appellant has not received multiple punishments for the same offense in violation of state double jeopardy.

XIV. Imposition of Personal Firearm Enhancements

A. Appellant's Argument

Appellant points out that the firearm allegations were all made under the gang-principal provision, and the jury found the gang allegations to be not true. The information alleged that "a principal" discharged or used a firearm. The allegation's reference to use only by a principal was confirmed by the prosecutor during jury instruction and argument. By imposing the 25-to-life *personal* discharge enhancements on both counts, the trial court erred and violated appellant's right to due process of law, fundamental fairness, notice and opportunity to defend, his liberty interest in the correct application of state law, and his right to pleading and jury findings on sentencing allegations. The section 12022.53, subdivision (d) enhancement must therefore be stricken.

B. Relevant Authority

The gang enhancement, section 186.22, subdivision (b)(1), provides for a sentence enhancement to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

Section 12022.53, subdivision (d) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) . . . , *personally* and intentionally discharges a firearm and proximately causes great bodily injury . . . or death to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years." (Italics added.) Section 12022.53, subdivision (e)(1) provides: "The enhancements provided in this section shall apply to any person *who is a principal* in the commission of an offense if *both* of the following are pled and proved: [¶] (A) *The person violated subdivision (b) of Section 186.22.* [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (Italics added.)

By means of subdivision (e)(1) of section 12022.53, the Legislature extended the personal firearm-use enhancements provided for in that section to include all persons involved in the commission of certain enumerated crimes when the trier of fact finds that the crimes are committed for the benefit of a criminal street gang. As long as the crimes are committed in furtherance of a gang objective, it does not matter whether the person personally used the firearm or acted only as an aider and abettor. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 15.)

C. Enhancements Under Section 12022.53 Must Be Stricken

The plain language of section 12022.53, subdivision (d) requires that the enhancement provided for in this section may only be imposed if the defendant *personally* discharged a firearm causing death—a circumstance that was not alleged against appellant. Although, as noted, a defendant may also be subject to the enhancement if the limited exception in section 12022.53, subdivision (e) applies, this vicarious liability for another principal's personal discharge of a firearm is only permissible if the requirements of the street gang enhancement are met. (See *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281.)

The verdict form required the jury to find whether it was true or not true that "a *principal* personally and intentionally" used and discharged a firearm causing death under section 12022.53, subdivisions (b), (c), and (d), and the jury found that these allegations were true. The verdict form first required, however, a finding of true or not true on the gang allegation under section 186.22, subdivision (b)(1). The jury found the gang enhancement not true. This not-true finding dictates that the vicarious liability provision of section 12022.53, subdivision (e)(1) does not apply and appellant cannot be sentenced under that subdivision in conjunction with subdivision (d). Furthermore, appellant was not charged with personal discharge of a firearm, and the prosecutor specifically told the jury that he was not seeking to prove personal discharge. He argued that gang crimes are committed in groups and everyone with knowledge of the crime is held responsible, stating, "You will not see us alleging that Mr. Casey personally used a weapon, okay? The law says that a principal used a weapon."

We agree with appellant that the trial court could not impose the additional 25-year term for the firearm enhancements because the jury rejected the required gang component. We must strike the section 12022.53, subdivision (d) findings and sentences on counts 1 and 2.

DISPOSITION

The judgment is modified to strike the sentence enhancements under section 12022.53, subdivisions (d) and (e)(1) in counts 1 and 2. In all other respects the judgment is affirmed. The superior court is directed to amend the abstract of judgment to reflect that the firearm enhancements are stricken.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST